IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JUANITA ROSARIO MORALES, Appellant.	2 CA-CR 2006-0107 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053847

Honorable Kenneth Lee, Judge

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Jessica L. Quickle
Phoenix
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes
Tucson
Attorneys for Appellant

B R A M M E R, Judge.

¶1 After a bench trial, Juanita Morales was convicted of one count of theft of a means of transportation and one count of third-degree burglary. The trial court suspended the imposition of sentence and placed Morales on concurrent terms of probation, the longest

of which was five years, and ordered her to pay $500 restitution to the victim, James Madison. On appeal, Morales contends the trial court abused its discretion in awarding restitution because, she maintains, her criminal conduct did not directly cause the economic loss suffered by Madison. We review a trial court's sentencing decisions for an abuse of discretion. *State v. Stotts*, 144 Ariz. 72, 87, 695 P.2d 1110, 1125 (1985). Because we cannot determine, on this record, whether the court's award of restitution was legally imposed, we vacate that portion of the sentencing order and remand this matter on that issue. *See State v. Carbajal*, 177 Ariz. 461, 464-65, 868 P.2d 1044, 1047-48 (App. 1994) ("When a trial court bases a restitution award on improper criteria, the proper remedy is to vacate that portion of the sentence and remand the matter to the trial court for a redetermination of restitution.").

¶2 At trial, victim James Madison testified he had parked and locked his 2004 Honda Element on the street in front of his house late at night on September 9, 2005, and had discovered it missing at about 11 a.m. the following morning. He found shattered automobile window glass on the ground "exactly where [he] had the car parked. . . . where the driver's door would have been." Madison testified that his mountain bike, biking gear, and assorted tools were inside the vehicle when it was stolen.

¶3 At about 2:00 p.m. that same day, Tucson Police Officer David Corado saw Morales driving the Honda and noticed broken glass in the well of the driver's window. After police dispatch informed Corado the Honda had been stolen, he initiated a stop and

detained Morales, her cousin Stephen Foxe, and her aunt Veronica, who had all been in the vehicle. Madison's personal belongings were not recovered.

¶4 Morales and Foxe were each charged with theft of a means of transportation by control with either the intent to permanently deprive another of its possession, A.R.S. § 13-1814(A)(1), or "knowing or having reason to know that the property is stolen," § 13-1814(A)(5), and burglary in the third degree, A.R.S. § 13-1506.[1] On the morning of Morales's trial, the state moved to dismiss its allegation based on § 13-1814(A)(1) and proceeded only on the charge under § 13-1814(A)(5) and the burglary charge. In support of the burglary charge, the state alleged Morales "knew or had reason to know" the Honda had been stolen "[a]nd that she was in there to—there with the intent to commit a felony, which was her being in control or possession of that stolen [automobile]."

¶5 In addition to the testimony of Madison and Corado, trial evidence included Morales's own testimony and her prior statements made to Tucson Police Officer Daniel Bartlett and Sergeant Gary Downard. Viewed in a light most favorable to supporting the judgment of conviction, *see State v. Garza*, 196 Ariz. 210, ¶ 2, 994 P.2d 1025-26 (1999), this evidence established that Foxe had driven the Honda to Morales's grandmother's house where he had found Morales and her aunt and had invited the two women to take a ride with him. The driver's window in the Honda had been broken, and Morales suspected the

[1]Foxe pleaded guilty to the first count of the indictment, which included charges under A.R.S. § 13-1814(A)(1) and (A)(5). He was sentenced to a 3.5-year term of imprisonment and ordered to pay $7,508.40 in restitution to Madison and his insurance company.

automobile had been stolen, but Foxe attempted to persuade her otherwise. After riding in the Honda for approximately thirty minutes, Morales became concerned that Foxe was inebriated and driving erratically, and so she asked him to let her drive. Morales then drove the Honda until Corado stopped the vehicle and placed her and Foxe under arrest.

¶6 Evidence at trial established that Madison's personal belongings were missing from the vehicle when it was recovered. According to Madison, the replacement value of his personal belongings was approximately $7,100 but, because the property was not new, his insurance company had valued his loss at about $5,700 and had reimbursed him about $5,200, reflecting a deduction for Madison's $500 policy deductible. Madison also paid $139 to repair the Honda's broken window.

¶7 Under the state's theory of the case, Morales's guilt was premised entirely on her entering and exercising control over a vehicle she knew or had reason to know was stolen. To prove this theory, the state relied on Morales's testimony that the window had been broken before she took control of the vehicle, giving rise to her reasonable suspicion that the Honda had been stolen. In its under advisement ruling, the court described the evidence supporting its conclusion that Morales had reason to know the Honda had been stolen. Without any additional findings, the court found Morales guilty of theft by control of stolen property and third-degree burglary.

¶8 At sentencing, Morales objected to any award of restitution; her attorney argued as follows:

> [T]here is and was presented at trial no proof that Ms. Morales took anything from that vehicle, nor is there any proof that

> there was anything in the vehicle when she got in the vehicle. . . . There has to be some proof that the defendant had some responsibility for causing the damage to the victim. . . . [T]here is no proof that she broke the window. It's pretty clear what her involvement was. The undisputed evidence is the vehicle presented itself to her in the condition that it was in when the police recovered it, and that she had nothing to do with stealing it.

The court ordered Morales to pay Madison $500 in restitution, as a joint and several obligation with her codefendant Foxe.

¶9 Section 13-603(C), A.R.S., requires a trial court to order a convicted defendant to pay restitution to the victim of the crime in the full amount of the economic loss the victim sustained. A loss is recoverable as restitution only if: (1) the loss is economic, (2) the loss is one the victim would not have incurred but for the defendant's criminal conduct, and (3) the defendant's criminal conduct has directly caused the economic loss. *State v. Wilkinson*, 202 Ariz. 27, ¶ 7, 39 P.3d 1131, 1133 (2002). Restitution may be awarded for losses caused by criminal conduct that is not an element of the crime for which a defendant is convicted. *Id.* ¶ 14. But, a trial court may not impose restitution "for which there is no supporting evidence before the trial court." *State v. Lindsley*, 191 Ariz. 195, 197, 953 P.2d 1248, 1250 (App. 1997). In other words, "cause-in-fact is a necessary . . . condition to restitution." *Id.* at 198, 953 P.2d at 1251,[2] *cf. In re Stephanie B.*, 204 Ariz.

[2]In *Lindsley*, Division One of this court explained that a forgery defendant was properly ordered to pay restitution for a victim's wallet, even though she had not been charged with its theft, because she "testified under oath that she [had] possessed the victim's wallet with the intent of permanently depriving the victim of it, thereby admitting the theft." *Lindsley*, 191 Ariz. at 197, 953 P.2d at 1250. In the same case, however, the trial court was held to have erred when it ordered Lindsley to pay restitution for a bracelet and ring

466, ¶ 17, 65 P.3d 114, 118 (App. 2003) (restitution is proper "*so long* as the juvenile is found delinquent of [a] criminal offense that properly supports the award").

¶10 The state has argued that the restitution order was proper because "sufficient evidence was presented to allow the trial court to infer that [Morales]'s criminal conduct caused Madison's economic loss," relying on *In re Andrew A.*, 203 Ariz. 585, 58 P.3d 527 (App. 2002). In *Andrew A.*, the juvenile had plead "responsible to '[c]ontrol[ling] property of another knowing . . . that the property was stolen' and agreed to pay up to $5,000 restitution." *Id.* ¶ 9 (alterations in *Andrew A.*). The juvenile argued on appeal that, although he had admitted having possessed a stolen jeep, the court had erred in imposing $2,062.08 in restitution, including $1,589.99 for the victim's personal belongings in the jeep when it was stolen, because the juvenile had never expressly admitted committing the theft of the vehicle or the personal property. *Id.* ¶ 6. Division One of this court affirmed, based on the plea agreement and a permissible inference, pursuant to A.R.S. § 13-2305, that the juvenile had participated in the theft of the jeep. *Id.* ¶ 10.

¶11 We agree with Morales that *Andrew A.* is distinguishable because the juvenile in that case had admitted responsibility and had agreed to pay restitution in an amount that exceeded that ordered by the court. *See State v. Phillips*, 152 Ariz. 533, 535, 733 P.2d 1116, 1118 (1987) (restitution properly awarded where defendant agrees to pay specific dollar amount of restitution in plea agreement). But, we agree with the state that, in the

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purportedly in the wallet when it was lost because the defendant had not admitted she had stolen the jewelry, was not convicted of that theft, had not agreed to pay restitution for it, and no supporting evidence regarding the lost jewelry had been presented at trial. *Id.*

absence of a satisfactory explanation, the trial court could have inferred from Morales's control of the vehicle no more than fourteen hours after it had been stolen that Morales had been "aware of the risk that it had been stolen or in some way participated in its theft." A.R.S. § 13-2305(1). Moreover, the trial court could have concluded that Morales's inconsistent testimony failed to provide a satisfactory explanation for her possession of the vehicle. *See State v. Jackson*, 101 Ariz. 399, 402, 420 P.2d 270, 273 (1966) ("There is a reasonable inference from false or unsatisfactory testimony that the truth would not support a conclusion that the taking [of a vehicle] was temporary.").

¶12 However, on this record, we cannot determine that Morales's conviction was based upon an inference permissible under § 13-2305(1). If the trial court merely drew the inference that Morales "was aware of the risk that [the Honda] had been stolen," but did not infer that Morales in some way participated in its theft, restitution would not be supported by the facts adduced at trial. If, on the other hand, the court inferred that Morales had, in some way, participated in the theft of the vehicle and its contents, she would be responsible for restitution. Based on the theory of the case presented by the state, either conclusion could have supported the convictions of theft by control and burglary; we cannot conclude restitution was proper without findings of fact regarding Morales's criminal conduct.

¶13 Additionally, assuming the court implicitly determined that Madison participated in the Honda's theft, it is unclear, on this record, how the court determined that $500 in restitution was reasonably related to that conduct. If the court concluded that Morales participated in theft of the vehicle only, the sole evidence of loss before the court

was the $139 Madison had paid to repair the broken window. If the court concluded that Madison had participated in the theft of the Honda and its contents, we are unable to discern why Morales would be ordered to pay only $500 in restitution to Madison when the court found her codefendant, Foxe, responsible for economic losses totalling $7,508.40, to be paid to Madison and his insurance company. *See State v. Merrill*, 136 Ariz. 300, 301, 665 P.2d 1022, 1023 (App. 1983) (policy underlying mandatory restitution "is best fulfilled if 'victim' includes the entity suffering the economic loss resulting from appellant's criminal activity").

¶14 We recognize that "[t]he trial court has discretion to set the restitution amount according to the facts of the case in order to make the victim whole." *Lindsley*, 191 Ariz. at 197, 953 P.2d at 1250. But, on this record, we cannot determine if the court's order is correct. We therefore affirm the convictions and the order placing Morales on probation, but we vacate the award of restitution and remand this matter to the trial court so it may reconsider the award consistent with this decision.[3]

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

[3]We note that because the state did not file a cross-appeal on the issue of restitution, the court may not increase the amount of restitution beyond that originally imposed. *See State v. Dawson*, 164 Ariz. 278, 282-83, 792 P.2d 741, 745-46 (1990).

PHILIP G. ESPINOSA, Judge